

Casenote

Beyond the Four Corners: Objective Good Faith Analysis or Subjective Erosion of Fourth Amendment Protections?

On July 18, 2002, the Court of Appeals for the Eleventh Circuit decided, as a matter of first impression, that a court may consider facts known only to an officer, not contained within an affidavit and warrant, in determining whether the officer exhibited objective, reasonable reliance upon an invalid warrant.¹ In *United States v. Martin*,² the court joined a majority of circuits now looking beyond the four corners of the affidavit and warrant and relying on the subjective knowledge of the officer, a tenet specifically denounced by the Supreme Court in *United States v. Leon*,³ to ascertain the applicability of the *Leon* good-faith exception to the exclusionary rule.⁴

I. FACTUAL BACKGROUND

On May 15, 2000, Atlanta Homicide Detective Brett Zimbrick, members of the Atlanta Police Gun Unit, and an agent of the Bureau of

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1. *United States v. Martin*, 297 F.3d 1308, 1309 (11th Cir. 2002).
 2. 297 F.3d 1308 (11th Cir. 2002).
 3. 468 U.S. 897, 919-20 n.20, 922-23 n.23 (1984).
 4. 297 F.3d at 1309.

Tobacco, Alcohol, and Firearms entered the apartment where Corey Martin resided. In the bedroom rented by Martin, the officers discovered a Taurus .38 caliber pistol and what appeared to be marijuana and crack cocaine. Martin was arrested and subsequently charged with violating 18 U.S.C. §§ 922(g) and 924(e),⁵ possession by a felon of a firearm and ammunition.⁶

The search of Martin's residence resulted from information acquired from Troy Terry, referenced in the affidavit and search warrant presented by Officer Zimbrick to Atlanta Municipal Court Judge Andrew Mickle.⁷ The affidavit stated:

On 5/15/00 Troy Terry initiated contact with the Atlanta Police Department and confessed to several crimes that took place outside the City of Atlanta. While taking a taped statement, the suspect admits to taking several weapons from a home in North Carolina and subsequently selling the weapons to the occupants of the listed apartment. Troy Terry directed the Atlanta Police to the specific apartment and personally pointed out the apartment in the presence of the Atlanta Police. It is believed that the weapons that have been verified as stolen out of North Carolina were in fact sold and presently are in the listed apartment.⁸

Claiming the issuance of the search warrant was without probable cause, Martin filed a motion to suppress the weapon and cocaine. The federal magistrate judge determined the warrant lacked probable cause and the affidavit failed to support a *Leon*⁹ good-faith exception to the exclusionary rule. In response to the government's request, the judge held an evidentiary hearing on March 13, 2001.¹⁰

At the hearing, Zimbrick testified to specific details obtained from Terry indicating that stolen weapons Terry used to commit murders in North Carolina were located in the apartment in which Martin resided.¹¹ These details were not contained in the affidavit. Zimbrick

5. 18 U.S.C. §§ 922(g), 924(e) (2000).

6. 297 F.3d at 1311.

7. *Id.*

8. *Id.*

9. 468 U.S. at 905, 926 (holding evidence is not excluded when obtained in reliance on an officer's good faith belief in the validity of a warrant issued by a neutral and detached magistrate though the warrant subsequently is found to be defective).

10. 297 F.3d at 1312.

11. While being held in the pretrial detention facility in Atlanta, Troy Terry contacted Officer Zimbrick on or about May 14, 2000, and confessed to committing two murders in North Carolina. According to Terry, he sold and traded the murder weapons for crack cocaine at an apartment in Atlanta. Terry related numerous details to Officer Zimbrick, including the locations of a string of burglaries Terry committed on the East Coast

further testified that within twelve to fourteen hours of interviewing Terry, Zimbrick requested Judge Mickle's approval of a search warrant for the apartment and GMC truck, seeking four handguns and a VCR. Zimbrick testified that he told the judge of Terry's confessions to two murders and to burglaries along the East Coast from which Terry had obtained guns to sell for crack and money, that Zimbrick believed Terry sold the guns immediately before his arrest, and that Terry had been under arrest for only a few days. Judge Mickle then issued the warrant. Judge Mickle testified he could not recall whether Officer Zimbrick related information to him not stated in the affidavit.¹²

The magistrate judge concluded that Zimbrick's knowledge of the facts, though not contained in the affidavit to support the warrant, could be considered to determine whether the good-faith exception of *Leon* was applicable. He further concluded that Zimbrick believed in good faith that the warrant was supported by probable cause. Therefore, the district court found that although the warrant lacked probable cause, the *Leon* good-faith exception applied, and the court upheld the search.¹³

Martin appealed to the Court of Appeals for the Eleventh Circuit, arguing that the district court improperly denied his motion to suppress.¹⁴ Specifically, Martin contended that "the magistrate judge should not have considered the facts known to the affiant but outside the four corners of the affidavit in order to determine whether the *Leon* good-faith exception applied to this case."¹⁵ The district court, in considering information not contained in the four corners of the search warrant, raised an issue of first impression for the Eleventh Circuit: "[I]n deciding whether the *Leon* good faith exception applies, may the reviewing court consider facts known to the affiant, but not contained on the face of the affidavit and underlying search warrant?"¹⁶ The circuit

following his release from prison in Perry, New York, items stolen, that he shot two men near Five Springs Campground in North Carolina, and that shell casings from the murder weapons were in a GMC truck stolen from Rochester, New York. Officer Zimbrick verified several aspects of Terry's story, i.e., the theft of four firearms Terry had stolen from the home of Cornelius Ashe in North Carolina; Terry's stay at Five Springs Campground; the theft of the GMC truck in Rochester, New York, on April 21, 2000, and its recovery in Atlanta on May 10, 2000; and that the truck contained articles corroborating Terry's claim of living in the truck. *Id.* at 1310-11, 1319-20.

12. *Id.* at 1310-12.

13. *Id.* at 1312.

14. *Id.*

15. *Id.* Martin also alleged that "the warrant was so lacking in probable cause that the detective's belief in it was entirely unreasonable[,] and [] the issuing Judge [Mickle] abandoned his judicial role and acted as a 'rubber stamp for the police.'" *Id.* (citation omitted).

16. *Id.* at 1309.

court summarily held, “[A] reviewing court may look outside the four corners of the affidavit in determining whether an officer acted in good faith when relying upon an invalid warrant.”¹⁷ The Eleventh Circuit affirmed the lower court’s decision to apply the good-faith exception to the exclusionary rule and upheld the court’s denial of Martin’s motion to suppress.¹⁸

II. LEGAL BACKGROUND

In *United States v. Leon*,¹⁹ the Supreme Court crafted an exception to the well-established exclusionary rule, a rule by which evidence obtained in violation of the Fourth Amendment is inadmissible in a federal or state court.²⁰ Primarily focusing on the purpose of the exclusionary rule as deterrence to unlawful police conduct, the Court held that when an officer relies in good faith on a magistrate’s finding of probable cause, the evidence obtained via the warrant will not be excluded though the warrant is subsequently found invalid.²¹

In *Leon* the affidavit forming the basis of the search warrant on the residence of Alberto Leon failed to establish the informant’s reliability or to provide the basis for the informant’s allegations of Leon’s criminal activity. Because of the deficiency in the warrant, Leon moved to suppress the evidence found at his residence and on his person. Following an evidentiary hearing, the district court found the affidavit defective in establishing probable cause. The court thus granted Leon’s motion to suppress and denied the government’s argument that the officer’s good-faith reliance on the validity of the search warrant rendered the exclusionary rule inapplicable. The Court of Appeals for the Ninth Circuit agreed.²²

The Supreme Court of the United States, however, in weighing the social costs of excluding inherently truthful evidence against the tremendous benefit conferred upon the guilty, concluded that modifying the exclusionary rule to provide a good-faith exception neither defenestrated the rule nor compromised its purpose.²³ Characterizing the

17. *Id.*

18. *Id.*

19. 468 U.S. 897 (1984).

20. *Id.* at 905. For a history of the exclusionary rule, see *Boyd v. United States*, 116 U.S. 616 (1886); *Weeks v. United States*, 232 U.S. 383 (1914); *Wolf v. Colorado*, 338 U.S. 25 (1949); *Elkins v. United States*, 364 U.S. 206 (1960); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Ker v. California*, 374 U.S. 23 (1963).

21. 468 U.S. at 926.

22. *Id.* at 901, 903 n.1, 903-05.

23. *Id.* at 922-24.

exclusionary rule as a “judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved,”²⁴ Justice White, writing for the majority, flatly stated, “[S]uppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the [deterrent] purpose of the exclusionary rule.”²⁵

The Court further instructed that all circumstances may be considered in determining whether an officer manifested objective, reasonable reliance on a subsequently invalidated warrant.²⁶ The Court clearly enunciated, however, the objective criteria intended as a basis for the “all circumstances” inquiry and did not obscure its denunciation of incorporating the subjective beliefs of the officers into the analysis.²⁷

[We] eschew inquiries into the subjective beliefs of law enforcement officers who seize evidence pursuant to a subsequently invalidated warrant Accordingly, our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization. In making this determination, all of the circumstances—including whether the warrant application had previously been rejected by a different magistrate—may be considered.²⁸

Purposely, the Court accentuated its adoption of an objective standard of reasonableness.²⁹ Though providing an exception to the applicability of the exclusionary rule, the Court emphasized that objective reasonableness would preserve the effectiveness of the rule.³⁰ Explicitly, the Court discounted a subjective analysis:

24. *Id.* at 906 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

25. *Id.* at 918. Thus, *Leon* brusquely signaled a change from the eloquent language of the Warren Court in *Mapp*, wherein the Court deemed the exclusionary rule “an essential part of the right to privacy” inherent in the Fourth Amendment:

[W]ithout the [exclusionary] rule the assurance against unreasonable federal searches and seizures would be “a form of words,” valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court’s high regard as a freedom “implicit in the concept of ordered liberty.”

Mapp, 367 U.S. at 655, 656 (citations omitted).

26. 468 U.S. at 922-23 n.23.

27. *Id.*

28. *Id.*

29. *Id.* at 919 n.20, 922 n.23.

30. *Id.* at 919-20 n.20.

Many objections to a good-faith exception assume that the exception will turn on the subjective good faith of individual officers. "Grounding the modification in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment."³¹

Adopting an objective standard, articulated the Court, sustains the requirement that officers possess reasonable knowledge of the law's prohibitions, thus preserving and furthering the deterrent purpose of the exclusionary rule.³²

Therefore, the objective standard is framed by the officer's knowledge and understanding of the requirements of the Fourth Amendment. That knowledge would equip the officer with the means of determining whether a warrant is violative of the Fourth Amendment despite the magistrate's authorization. Objective good faith, then, rests on a foundation of Fourth Amendment compliance, not individualized, subjective knowledge of facts known only to the officer.

A. *Evolution of "All Circumstances" in the Eleventh Circuit*

Numerous cases reveal the evolution of the "all circumstances" standard within the Eleventh Circuit. Six months after *Leon*, the Court of Appeals for the Eleventh Circuit applied the *Leon* good-faith ruling and remanded *United States v. Accardo*³³ for consideration in light of that exception.³⁴ In *Accardo*, a case decided by the district court prior to the rulings of *Leon* and its companion case, *Massachusetts v. Sheppard*,³⁵ the district court did not evaluate the officer's good-faith reliance upon the violative warrant.³⁶ Finding that all circumstances had yet to be considered, the Eleventh Circuit directed the district court to conduct an evidentiary hearing, ascertain the facts, and make a good-

31. *Id.* (quoting *Illinois v. Gates*, 462 U.S. 213, 261 n.15 (1983) (White, J., concurring)).

32. *Id.*

33. 749 F.2d 1477 (11th Cir. 1985).

34. *Id.* at 1481.

35. 468 U.S. 981 (1984). In *Sheppard* the Supreme Court refused to hold "that an officer is required to disbelieve a judge who has just advised him, by word and by action, that the warrant he possesses authorizes him to conduct the search he has requested." *Id.* at 989-90. The Court elucidated that if an error of constitutional dimensions occurred regarding the warrant, it was committed by the judge, not the officer, and the exclusionary rule was not adopted "to punish the errors of magistrates and judges," but to deter unlawful police conduct. *Id.* at 990 (quoting *Illinois v. Gates*, 462 U.S. at 263 (White, J., concurring)).

36. 749 F.2d at 1481.

faith determination based upon *Leon*, *Sheppard*, and the circuit court's own analysis of the applicability of the good-faith exception.³⁷

In 1990 the Eleventh Circuit established its own standard, in comportment with *Leon*, for determining whether a good-faith exception to the exclusionary rule is applicable.³⁸ In *United States v. Taxacher*,³⁹ the court specifically enunciated the proper test as one "focused on a reasonably well-trained officer and . . . based upon the totality of the circumstances."⁴⁰ In formulating its standard, the Eleventh Circuit drew upon the Supreme Court's application of *Leon* in *Malley v. Briggs*.⁴¹ In *Malley* the Court distinguished between the officer who relies upon a warrant issued "within the range of professional competence of a magistrate" and an officer whose request for a warrant falls "outside the range of professional competence expected of an officer," thus negating any claim of reasonable reliance.⁴² The test was the reasonableness of the officer, not the reasonableness of the jurist.⁴³

Consequently, focusing on the officer, the circuit court in *Taxacher* crafted its standard on whether a reasonable or well-trained officer evidenced reasonable reliance upon the magistrate's authority.⁴⁴ Vital to the analysis, deemed the court, is whether a reasonable officer would have recognized that the search was based on an illegal warrant.⁴⁵ Such a determination, held the court, must consider all circumstances.⁴⁶

Under its "totality of the circumstances" standard, the circuit court in *Taxacher* contemplated the officer's testimony providing additional facts pertaining to his encounter with Taxacher⁴⁷ and the officer's reliance on the advice of a local district attorney for proper completion of the

37. *Id.*

38. *United States v. Taxacher*, 902 F.2d 867, 872 (11th Cir. 1990).

39. 902 F.2d 867 (11th Cir. 1990).

40. *Id.* at 872.

41. *Id.* (citing *Malley v. Briggs*, 475 U.S. 335, 345-46 n.9 (1986)).

42. *Id.* at 872 n.5 (quoting *Malley*, 475 U.S. at 346 n.9).

43. *Id.* at 872.

44. *Id.* at 871-72.

45. *Id.* at 871.

46. *Id.*

47. *Id.* at 869-70, 872-73. After being stopped for speeding, Taxacher became increasingly nervous, provided inconsistent answers regarding the rental car he was driving and the purpose of his travel, and withdrew consent for a search of the contents in the trunk. Upon discovery that Taxacher's license was suspended, the officer contacted the local district attorney for advice on the proper completion for a search warrant application. The warrant was approved by a magistrate but later found insufficient to support probable cause for the search of the vehicle and its contents. *Id.* at 869-70.

search warrant application.⁴⁸ Though not included in the affidavit, the facts giving rise to the warrant application, in conjunction with the officer's efforts to present a valid search warrant application, indicated objective good faith in the eyes of the court.⁴⁹ Hence, under its totality standard, the Eleventh Circuit intimated going beyond the circumstances set forth in the affidavit.⁵⁰

The purpose of the exclusionary rule, noted the court, is not to deter "objectively reasonable law enforcement activity" or "punish the errors of judges and magistrates," but "to deter police misconduct."⁵¹ Applying this purpose to the totality of the circumstances, the Eleventh Circuit upheld the district court's application of the good-faith exception.⁵² Thus, the "all circumstances" test of *Taxacher* reflected the court's willingness to consider facts known beyond the four corners of the affidavit, facts known only to the officer, in determining objective good-faith reliance on an invalid warrant.⁵³

In 1998 the Eleventh Circuit again applied a "totality of the circumstances" standard.⁵⁴ In *United States v. Ginton*,⁵⁵ the court held that under the "totality of the circumstances . . . the magistrate judge's probable cause determination shield[ed] the officers who exercised the warrant."⁵⁶ In *Ginton* five defendants were convicted of various counts of drug trafficking based in part on information obtained via a wiretap. To realize future arrests, the officers chose to keep the existence of the wiretap confidential and did not include that information in the warrant.⁵⁷ The court upheld the validity of the warrant, stating that the magistrate was not misled, the wiretap was a reliable source, and

48. *Id.* at 870, 872. The affidavit simply stated:

(1) the defendant appeared overly nervous; (2) the rental agreement indicated that the car was past due; (3) the defendant gave inconsistent stories about his travel plans; and (4) the defendant initially consented to a search of the vehicle, then withdrew consent when the trooper asked to look into a specific satchel.

Id. at 870.

49. *Id.* at 870, 872-73.

50. *Id.* at 872-73.

51. *Id.* at 872 (quoting *Leon*, 468 U.S. at 916, 919).

52. *Id.* at 873.

53. *Cf.* *United States v. Burke*, 784 F.2d 1090 (11th Cir. 1986) (evaluating the sufficiency of the warrant based on knowledge of the officer not reflected in the affidavit and warrant).

54. *United States v. Ginton*, 154 F.3d 1245, 1257 (11th Cir. 1998).

55. 154 F.3d 1245 (11th Cir. 1998).

56. *Id.* at 1257.

57. *Id.* at 1255. When officers presented an affidavit and search warrant application to the magistrate for authorization, they orally informed the judge that the "informant" listed on the warrant was actually a wiretap of the phone of one of the defendants. *Id.*

the magistrate was to consider all circumstances in determining probable cause.⁵⁸ Emphasizing the issue as whether the officer relied in good faith upon the probable cause determination of the magistrate rather than the determination of probable cause itself, the court applied *Leon* and affirmed the lower court's denial of the motion to suppress.⁵⁹ Again, the Eleventh Circuit contemplated information within and beyond that contained in the affidavit and warrant in finding the good-faith exception applicable.⁶⁰

B. Totality Extends Beyond the Four Corners

Numerous decisions by a majority of circuits reflect the shift of the post-Warren Court from stringent protection of Fourth Amendment rights to minimization of impediments to the truth-finding function of our criminal justice system.⁶¹ Reluctance to exclude evidence and adherence to a "totality of the circumstances" analysis has resulted in the case-by-case approach advocated in *Leon*.⁶² Only when the deterrent purpose is most efficaciously served will the exclusionary rule be applied;⁶³ only when one of the four exceptions to the *Leon* good-faith exception precludes its application will a court suppress evidence obtained in reasonable reliance on a subsequently invalidated warrant.⁶⁴ The years following *Leon* reveal the impact of the "totality of the circumstances" approach and the resulting shift toward inclusion of evidence.⁶⁵

In 1988 the Fourth Circuit gauged the reasonableness and objectivity of officers executing a warrant based on "reliable information known to them outside the four corners of the warrant and affidavit."⁶⁶ In

58. *Id.*

59. *Id.* at 1257.

60. *Id.* at 1256-57.

61. *See Leon*, 468 U.S. at 905-08.

62. *See id.* at 918.

63. *See id.* at 908.

64. *Martin*, 297 F.3d at 1313 (noting four sets of circumstances that preclude a *Leon* good-faith exception: (1) when the magistrate was misled by knowingly false information by the affiant or information the affiant should have known was false if not for reckless disregard for truth; (2) when the issuing judge wholly abandons his judicial role; (3) when the affidavit in support of the warrant lacks sufficient indicia of probable cause so that reliance is unreasonable; and (4) when the warrant is so facially deficient that its validity cannot be relied upon by the executing officers).

65. *See, e.g., United States v. Gahagan*, 865 F.2d 1490, 1497 (6th Cir. 1989) (holding, in part, that under the totality of the circumstances, facts known to the officers outside of those presented in the affidavit cured the deficiency of the warrant).

66. *United States v. Owens*, 848 F.2d 462, 466 (4th Cir. 1988).

United States v. Owens,⁶⁷ the Fourth Circuit determined that facts known to the officers authorized a “good faith interpretation of the warrant.”⁶⁸ The warrant in *Owens* described with particularity the building in which the apartment to be searched was located but gave an erroneous apartment number based on electric and gas records. Nonetheless, reasoned the court, the deficiency was cured by the personal observations and good-faith reasoning of the officers.⁶⁹

The Fourth Circuit specifically emphasized its reliance upon *Leon*, *Sheppard*, and *Maryland v. Garrison*⁷⁰ in finding the “extreme sanction of exclusion” inappropriate.⁷¹ The court propounded that *Leon* represented a distinct change regarding the exclusionary rule.⁷² Suppressing evidence obtained in good-faith reliance on a warrant cannot further the purpose of the rule when police misconduct is not at issue.⁷³ Further, noted the court, reliance may be objectively reasonable though the warrant is facially deficient.⁷⁴ In *Sheppard* the Supreme Court refused to apply the exclusionary rule when the officer, having received the magistrate’s assurance that the controlled substance warrant form would be altered to indicate a search for evidence in a homicide, reasonably and objectively relied on the warrant.⁷⁵

Additionally, the circuit court applied the standard in *Garrison*: The constitutionality of the officers’ conduct must be judged considering the information available to the officers at the time of the search, and ambiguous situations may generate reasonable mistakes for which latitude should be given.⁷⁶ The court adhered to the rationale expressed in *Garrison*, i.e., suppression based on a mistake in fact unknown to the officers would “brand as illegal the execution of any warrant in which, due to a mistake in fact, the premises intended to be searched vary from their description in the warrant.”⁷⁷ Stated the Fourth Circuit, “The officers were justified in using common sense and

67. 848 F.2d 462 (4th Cir. 1988).

68. *Id.* at 466.

69. *Id.* at 465-66. According to reliable information, the apartment was located on the right side of the third floor; according to the officers’ observations, the apartment to the right, although displaying a different number than listed on the warrant, was the only occupied premise on the third floor. *Id.*

70. 480 U.S. 79 (1987).

71. *Owens*, 848 F.2d at 464-66 (citing *Leon*, 468 U.S. at 897; *Sheppard*, 468 U.S. at 981; *Garrison*, 480 U.S. at 79).

72. *Id.* at 464.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 464-66 (citing *Garrison*, 480 U.S. at 85, 87).

77. *Id.* at 466 (quoting *Garrison*, 480 U.S. at 89 n.14).

reliable information known to them outside the four corners of the warrant and affidavit to assist in determining the place actually authorized by the warrant to be searched.”⁷⁸ Finding that the Fourth Amendment operates to protect against exploratory searches and indiscriminate governmental intrusions, neither of which characterized the search at issue, the court upheld the good-faith determination of the officers.⁷⁹

In 1996 the First Circuit likewise applied the *Leon* good-faith exception based on facts known to the officer but not included in the warrant application.⁸⁰ In *United States v. Procopio*,⁸¹ an affidavit giving a corrected address for a search warrant failed to provide the basis for linking the suspect with the new address. The information supporting probable cause to search the address, i.e., the surveillance agent observed that defendant lived in the building and had been in the particular apartment just prior to the search, was not included in the affidavit.⁸² Nonetheless, finding ample basis for the search in light of the agent’s knowledge, the court concluded that the agents acted in objective, reasonable reliance upon the warrant.⁸³

With the new decade, circuits continued to expand the defining boundaries of the “totality of the circumstances” approach.⁸⁴ In 2001 the Eighth Circuit held in *United States v. Marion*⁸⁵ that the court will consider “any information known to the officers but not presented to the issuing judge” in assessing an officer’s objective good faith in executing a warrant.⁸⁶ Relying on its decision eleven years earlier in *United States v. Simpkins*,⁸⁷ the Eighth Circuit reiterated its “totality of the circumstances” approach.⁸⁸ Although the affidavit in *Marion* failed to link defendant’s motel room with criminal activity, the court upheld the

78. *Id.*

79. *Id.*

80. *United States v. Procopio*, 88 F.3d 21, 28 (1st Cir. 1996).

81. 88 F.3d 21 (1st Cir. 1996).

82. *Id.* at 28.

83. *Id.*

84. *See, e.g.*, *United States v. Danhauer*, 229 F.3d 1002 (10th Cir. 2000) (holding that the officer manifested objective good faith in the warrant based on the details of his investigation notwithstanding the failure to include those details in the affidavit presented to the magistrate).

85. 238 F.3d 965 (8th Cir. 2001).

86. *Id.* at 969 (quoting *United States v. Simpkins*, 914 F.2d 1054, 1057 (8th Cir. 1990)).

87. 914 F.2d 1054, 1057-58 (8th Cir. 1990) (holding that under the totality of the circumstances, considering facts not presented to the magistrate but known to the officers as a result of an undercover investigation, the officers displayed objective reasonable reliance upon the subsequently invalidated search warrant).

88. 238 F.3d at 969.

search of the motel room based on the assessments of two experienced narcotics officers who had stopped defendant in his vehicle and discovered crack cocaine in the vehicle and on defendant's person.⁸⁹ The officers did not include this knowledge in the affidavit; yet, in conjunction with the information contained in the affidavit, the court found the *Leon* good-faith exception applicable.⁹⁰ Finding no improper conduct by the police, the court refused to apply the extreme remedy of exclusion.⁹¹

Similarly, the Seventh Circuit in *United States v. Word*⁹² affirmed the decision of the district court that it may consider information outside the four corners of the affidavit—information known only to the affiants and executing officers—in determining whether the good-faith exception to the exclusionary rule applies.⁹³ In the case before the lower court, detectives failed to include in the affidavit their familiarity with the informant and that the informant personally observed stolen goods delivered to defendant's residence.⁹⁴ Finding the warrant obviously deficient so that no reasonable officer could rely on its four corners to authorize a search for drugs, the district court nevertheless held that “the officers executing the warrant could reasonably rely on information known to them outside the four corners of the document to clarify the garbled portion of the affidavit.”⁹⁵ The lower court stressed that the information missing from the affidavit would have *substantially supported* a probable cause determination—a sharp contrast to an officer's withholding information *detrimental* to a probable cause finding. Further, the district court cited numerous circuit court decisions in support of its proposition.⁹⁶ Adopting the reasoning of the circuit courts, the lower court in *Word* emphasized, “Just as the court may consider what an officer actually knew in order to determine if he acted in bad faith (*i.e.*, whether the officer was concealing material information

89. *Id.*

90. *Id.* at 970.

91. *See id.*

92. No. 00-2688, 2001 WL 13133 (7th Cir. Jan. 2, 2001).

93. *Id.* at *1.

94. *United States v. Word*, No. 99-106-CR-H/F, 2000 WL 724041, at *10 (S.D. Ind. May 31, 2000), *aff'd*, 2001 WL 13133 (7th Cir. Jan. 2, 2001).

95. *Id.* at *14.

96. *Id.* at *10-13 (citing, *e.g.*, *United States v. Dickerson*, 975 F.2d 1245 (7th Cir. 1992) (applying the good-faith exception based upon information supporting probable cause known to the executing officers but outside the four corners of the affidavit and warrant); *United States v. Martin*, 833 F.2d 752, 756 (8th Cir. 1987) (“[W]hen assessing good faith we can and must look to the totality of the circumstances including what [the officer] knew but did not include in his affidavit.”)).

or lying to the judge), the court may also consider what the officer knew in determining whether he acted reasonably in executing a search warrant issued by a judge with authority to do so.⁹⁷

Moreover, the lower court incorporated *Sheppard* in its analysis. Asserting that *Leon* did not address this issue, the district court stressed that in the companion case of *Sheppard*, the Supreme Court provided guidance through its holding that the officer acted in good faith notwithstanding the defects in the warrant.⁹⁸ The district court in *Word* noted that “the [Supreme] Court took into account the knowledge of the executing officer beyond the contents of the warrant.”⁹⁹ Thus, concluded the lower court, the good-faith exception applied due to the information known to the officers and the determination of the issuing judge.¹⁰⁰

Distinguishable in *Sheppard*, however, is that the officer *informed* the judge of the error in the warrant form and received assurance from the magistrate that the error would be corrected.¹⁰¹ The Supreme Court did not base its ruling on facts known only to the officer but not presented to the magistrate.¹⁰² Nonetheless, the lower court included *Sheppard* as precedent for its holding,¹⁰³ and the Seventh Circuit upheld the lower court’s application of the good-faith exception.¹⁰⁴

C. Disparity Among the Circuits

While a majority of circuits have extended the “all circumstances” holding of *Leon* to include facts known to the officers but not presented to the magistrate, dissension remains among the circuits as to this interpretation. The Ninth Circuit conclusively stated in *United States v. Hove*¹⁰⁵ that “*Leon* does not extend . . . to allow the consideration of facts known only to an officer and not presented to a magistrate.”¹⁰⁶ The affidavit in *Hove* failed to connect defendant to the residence to be searched. Although the district court found the affidavit lacked sufficient indicia of probable cause, the court found the good-faith exception applicable based on information the officer knew but failed to

97. *Id.* at *12.

98. *Id.* at *13 (citing *Sheppard*, 468 U.S. at 989-90).

99. *Id.*

100. *Id.* at *14.

101. *See* 468 U.S. at 989.

102. *Id.*

103. *Word*, 2000 WL 724041, at *13.

104. *Word*, 2001 WL 13133, at *1.

105. 848 F.2d 137 (9th Cir. 1988).

106. *Id.* at 140.

present to the magistrate.¹⁰⁷ The Ninth Circuit reversed the lower court's decision, stating, "The *Leon* test for good faith reliance is clearly an objective one, and it is based solely on facts presented to the magistrate. An obviously deficient affidavit cannot be cured by an officer's later testimony on his subjective intentions or knowledge."¹⁰⁸ Though the circuit court noted the total deficiency of the affidavit and warrant, which in itself precludes application of *Leon*,¹⁰⁹ the Ninth Circuit did not conclude its analysis on that point.¹¹⁰ Rather, the court emphasized that the objective test of *Leon* requires a "colorable showing of probable cause" to a judge or magistrate and precludes as a remedy subsequent testimony of the subjective knowledge of the officer.¹¹¹ The circuit court denounced the apparent reliance of the lower court on facts subjectively known by the officer but not included in the affidavit and expounded that *Leon* made no such provision.¹¹²

The Third Circuit also finds irrelevant the subjective beliefs of the officer.¹¹³ In 2001 the court held in *United States v. Hodge*¹¹⁴ that officers manifested objective, reasonable reliance on the warrant.¹¹⁵ The circuit court recognized that the affidavit may have "presented a close call" in linking defendant's home with criminal activity but ruled it was objectively reasonable for the officers to rely on the magistrate's determination.¹¹⁶ Defendant propounded that the officer subjectively knew probable cause did not exist, preventing the officer from reasonably relying on the warrant.¹¹⁷ The Third Circuit rejected that argument, stating, "The Supreme Court has emphasized that the good faith exception requires objectively, not subjectively, reasonable conduct."¹¹⁸ Noting that the test for application of the good-faith exception is "whether a reasonable well trained officer would have known that the search was illegal despite the magistrate's authorization," the court found that the affidavit presented sufficient evidence to the magistrate

107. *Id.* at 138.

108. *Id.* at 140.

109. *Leon*, 468 U.S. at 923.

110. 848 F.2d at 140.

111. *Id.*

112. *Id.*

113. *United States v. Hodge*, 246 F.3d 301, 309 (3d Cir. 2001).

114. 246 F.3d 301 (3d Cir. 2001).

115. *Id.* at 310.

116. *Id.* at 309.

117. *Id.*

118. *Id.*

to support a probable cause finding.¹¹⁹ Therefore, expounded the court, the officers' reliance on the authorization of the magistrate was objectively reasonable "regardless of their supposed subjective belief."¹²⁰

The Supreme Court in *Leon* believed the objective reasonableness test would function to ameliorate application of the good-faith exception.¹²¹ Yet, disparity exists among circuits over the manner in which objective reasonableness is established.¹²² Essentially, numerous circuits have extended *Leon* beyond the authorization of the magistrate. Although the present case is one of first impression in the Eleventh Circuit, the court's holding in *Martin* that "a reviewing court may look outside the four corners of the affidavit in determining whether an officer acted in good faith when relying upon an invalid warrant" encompasses wide support.¹²³ The Eleventh Circuit clearly perpetuates the reluctance to apply the exclusionary rule to Fourth Amendment violations in the post-Warren Court era.¹²⁴

III. THE COURT'S RATIONALE

In *Martin* the Eleventh Circuit explicitly relied on its prior case law and that of other circuits as authority for looking beyond the four corners of the warrant and accompanying affidavit to assess an officer's objective, good-faith reliance on a subsequently violative warrant.¹²⁵ Before analyzing whether the *Leon* good-faith exception was applicable in *Martin*, the Eleventh Circuit determined that none of the four situations precluding application of *Leon* existed.¹²⁶ Thereafter, turning its inquiry to "whether a reasonably well-trained officer would know that the warrant was illegal despite the magistrate's authorization," the court elucidated the issue as whether Officer Zimbrick evidenced reasonable reliance on the search warrant.¹²⁷ Resolution of

119. *Id.* at 307 (quoting *United States v. Loy*, 191 F.3d 360, 367 (3d Cir. 1999) (quoting *Leon*, 468 U.S. at 922 n.23)).

120. *Id.* at 310.

121. 468 U.S. at 919-20 n.20, 924.

122. See CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS pt. A, §2.03, at 28-29 (4th ed. 2000).

123. 297 F.3d at 1309.

124. See WHITEBREAD & SLOBOGIN, *supra* note 122, at 22-34.

125. 297 F.3d at 1318.

126. *Id.* The Eleventh Circuit found without merit Martin's claims that (1) the affidavit was so lacking in indicia of probable cause as to preclude the officer's reasonable reliance upon the warrant and (2) the judge wholly abandoned his judicial role in issuing the warrant. *Id.* at 1315, 1317-18.

127. *Id.* at 1318.

this issue compelled the court to determine whether information not included in the affidavit and warrant application but known only to the officers, including Zimbrick, could be considered in its analysis.¹²⁸ The principal inquiry thus became whether a test of objective, reasonable reliance allowed the court to look beyond the four corners of the warrant and affidavit to ascertain objective good faith on the part of the officer.¹²⁹ The Eleventh Circuit answered in the affirmative.¹³⁰

Adhering to the standard established in *Taxacher*,¹³¹ and contemplating decisions of similar query in other circuits, the Eleventh Circuit held that the “totality of the circumstances” standard incorporates facts outside the affidavit and warrant.¹³² In effect, the court ruled that the subjective knowledge of the officer was relevant to a good-faith inquiry.¹³³ The circuit court propounded that its “totality of the circumstances” standard, suggested in *Accardo*¹³⁴ and applied in *Glinton*,¹³⁵ parallels the standard established in *Leon*, wherein the Supreme Court authorized consideration of “all circumstances” when determining “whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization.”¹³⁶ The court stressed that in *Taxacher* it reviewed all circumstances, including facts known to the officer but not included in the affidavit, and upon finding the warrant possessive of sufficient indicia of probable cause, it held that the officer manifested objective good faith in the validity of the warrant.¹³⁷ Consequently, reasoned the Eleventh Circuit, *Taxacher* advocated consideration of information beyond the affidavit.¹³⁸

Not confining its analysis to its own precedent, the Eleventh Circuit also relied on decisions of the First, Fourth, Seventh, and Eighth Circuits, referenced above in *Procopio*, *Owens*, *Word*, and *Marion*, respectively, as well as cases from the Sixth and Tenth Circuits, wherein

128. *Id.*

129. *Id.* at 1309.

130. *Id.* at 1309, 1318.

131. 902 F.2d at 872.

132. 297 F.3d at 1319.

133. *Id.* at 1320.

134. 749 F.2d at 1481.

135. 154 F.3d at 1257.

136. 297 F.3d at 1318-19 (quoting *Taxacher*, 902 F.2d at 871) (quoting *Leon*, 468 U.S. at 922 n.23)).

137. *Id.* at 1319.

138. *Id.*

the courts looked to information outside the affidavit and warrant to assess good faith.¹³⁹

However, circuit courts of appeal are not united on this issue. In *Martin* the Eleventh Circuit attempted to distinguish the holding of the Ninth Circuit in *Hove*, which disallowed consideration of information beyond the affidavit and solely in the possession of the officer.¹⁴⁰ The Eleventh Circuit asserted that subsequent testimony of the officer's subjective knowledge or intentions was precluded in *Hove* because the affidavit in that case lacked "any indicia of probable cause."¹⁴¹ Emphasizing the "total deficiency of the warrant and affidavit" as dispositive in *Hove*, the Eleventh Circuit stressed that, in contrast, scrutiny of the affidavit in *Martin* revealed "sufficient 'indicia of probable cause,' and [we] can now look beyond the four corners of the affidavit to determine whether the *Leon* good faith exception applies."¹⁴²

Yet, the Eleventh Circuit's efforts are unpersuasive. In *Hove* the Ninth Circuit found one of the situations precluding application of the *Leon* good-faith exception; the affidavit was so deficient that no reasonable reliance on its validity could exist.¹⁴³ While the Ninth Circuit acknowledged that a total deficiency could not be cured by subsequent, subjective testimony, the court made no allusions to degrees of deficiency affecting the analysis nor did the court make any concessions for going beyond the four corners of the affidavit and warrant in a good-faith analysis.¹⁴⁴

In further support of its holding, the Eleventh Circuit noted several factors exhibiting good-faith reliance by Officer Zimbrick.¹⁴⁵ Moreover,

139. *Id.* (citing *Procopio*, 88 F.3d at 28; *Owens*, 848 F.2d at 466; *Word*, 2000 WL 724041 at *14, *affd*, 2001 WL 13133 at *1; *Marion*, 238 F.3d at 969; *Gahagan*, 865 F.2d at 1498; *Danhauer*, 229 F.3d at 1007).

140. *Id.* at 1319 n.11 (citing *Hove*, 848 F.2d at 140).

141. *Id.* (quoting *Hove*, 848 F.2d at 140).

142. *Id.*

143. 848 F.2d at 138.

144. *Id.* at 140.

145. 297 F.3d at 1319-20. Zimbrick verified many aspects of Terry's story: Terry stole the truck in Rochester, New York, on April 21, 2000; in North Carolina, Terry robbed the home of Cornelius Ashe, taking certain handguns he claimed to have sold at the apartment in Atlanta; the campground at which Terry claimed to have stayed was located in North Carolina; particular items had been left in the truck supporting Terry's claim to have lived in the vehicle; and Isaac Deloach was arrested driving the stolen vehicle. Zimbrick also required Terry to accompany two detectives to identify the specific apartment where he sold the guns. Additionally, Zimbrick verified the freshness of the information. He confirmed Terry's arrest on May 11 and the recovery of the stolen truck on May 10. After contact with Terry on May 14, Zimbrick sought the warrant the following day. Terry's lack of money, nothing to pawn, and no job, along with his admission of smoking a large amount

the court found that those facts unintentionally omitted by Zimbrick would have supported a finding of probable cause.¹⁴⁶ “[T]he purpose of the exclusionary rule is to deter unlawful police misconduct . . . to guard against police officers who purposely leave critical facts out of search warrant affidavits because these facts would not support a finding of probable cause.”¹⁴⁷ Finding no furtherance of this purpose, the court propounded that any mistakes were attributable to the issuing judge.¹⁴⁸ Notwithstanding the judge’s partial reliance on past experience with Zimbrick in lieu of requiring specific information as to times and dates, the court held that the judge did not wholly abandon his role, the officer was not accountable for the mistake of the judge, and the *Leon* good-faith exception applied.¹⁴⁹

Applying the “totality of the circumstances” standard and decisions of other circuits upholding the validity of searches based upon information known to officers but not presented to the magistrate, the Eleventh Circuit concluded that Zimbrick displayed reasonable reliance upon the search warrant.¹⁵⁰ The Eleventh Circuit considered the *subjective* knowledge and *subjective* beliefs of Officer Zimbrick resulting from his investigation.¹⁵¹ Yet, the court held that Officer Zimbrick “acted in *objective* good faith when applying for and executing the warrant.”¹⁵² Accordingly, the Eleventh Circuit affirmed the district court’s denial of Martin’s motion to suppress.¹⁵³

IV. IMPLICATIONS

In citing *Leon* as authority for extending a “totality of the circumstances” analysis beyond the information presented to a detached and neutral magistrate, the circuits choose to ignore that their application of “all circumstances” results in severe erosion of the objective standard specifically established in *Leon*.¹⁵⁴ By interpreting “all circumstances”

of crack, led Zimbrick to infer that Terry had sold the guns for money or cocaine between May 9 and May 11. Zimbrick also believed Terry’s clear recollection of the apartment’s location indicated a recent transaction. *Id.*

146. *Id.* at 1320.

147. *Id.*

148. *Id.*

149. *Id.* (citing *Leon*, 468 U.S. at 921 (“Penalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”)).

150. *Id.*

151. *Id.* at 1319-20.

152. *Id.* at 1320 (emphasis added).

153. *Id.* at 1320-21.

154. *See Leon*, 468 U.S. at 919 n.20, 922 n.23.

to include those facts known only to the officer applying for or executing the warrant—facts not presented to the neutral and detached magistrate—the circuit courts reduce the *objective* standard to a “form of words” as the courts consider the *subjective* knowledge of the officer.¹⁵⁵ Thus, these circuits apply a standard explicitly criticized in *Leon*.¹⁵⁶

The Court in *Leon* intended the objective test of good-faith reliance on the part of the officer to function as a shield against erosion of Fourth Amendment protections.¹⁵⁷ A reasonable, well-trained officer—well-trained on the limitations imposed by the Fourth Amendment—could ascertain the validity of the warrant and affidavit independent of the magistrate’s authorization.¹⁵⁸ As intended by the Supreme Court, objective, reasonable reliance necessitates knowledge of Fourth Amendment violations; it does not demand or embrace knowledge of facts beyond the four corners of the affidavit and warrant.¹⁵⁹

When courts consider information beyond that presented to the magistrate, beyond the four corners of the affidavit and warrant, the test becomes not whether a reasonable officer could have relied on the warrant, but whether a particular officer relied on facts known only to him, not contained in the affidavit or warrant, as authorization for the search. The test becomes the subjective good faith of the individual officer. The objective standard of inquiry fails. The inquiry no longer seeks to discover whether a reasonable, well-trained officer would have recognized the search to be violative of the Fourth Amendment, notwithstanding the magistrate’s authorization; the inquiry becomes what did the particular officer know or believe that would uphold his search as one conducted in good faith. This subjective test manifests the specific criticisms, noted in *Leon*, that the good-faith exception will be a “subjective good faith” inquiry.¹⁶⁰ In effect, as expounded in *Hove*, the officer is allowed to cure the defective affidavit with subsequent testimony of his subjective knowledge or intentions.¹⁶¹

In its attempt to distinguish *Hove*, the Eleventh Circuit essentially carved a new rule that looking beyond the four corners of the affidavit is authorized when the affidavit presents sufficient indicia of probable cause.¹⁶² The court’s language attempts to lend credence to its holding

155. *Id.* at 930 (Brennan, J., dissenting) (quoting *Silverthorne Lumbar Co. v. United States*, 251 U.S. 385, 392 (1920)).

156. *See id.* at 919 n.20, 922 n.23.

157. *See id.* at 915 n.13, 919-20 n.20.

158. *Id.* at 920 n.20.

159. *See id.*

160. *Id.* at 919 n.20.

161. *See Hove*, 848 F.2d at 140.

162. *See Martin*, 297 F.3d at 1319 n.11.

but is without authority. *Leon* does not authorize subjective inquiry when there is sufficient indicia of probable cause; it simply states that objective good faith cannot be manifested when the affidavit is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.”¹⁶³ The Eleventh Circuit thus broadens its own expansion of the good-faith exception. The court renders one of the exceptions precluding application of the good-faith exception as a sanction for subjective inquiry. This trend extending *Leon* affirms the fears articulated in *Leon* by Justices Brennan, Marshall, and Stevens expressed in dissent.¹⁶⁴

Can an officer’s *subjective* knowledge of facts known only to him create *objective* reasonable reliance on an invalid warrant? Do Fourth Amendment protections against unreasonable searches and seizures turn on the subjective knowledge of the officer—subjective knowledge to the officer alone from which no magistrate can determine probable cause? If so, what then is the role of the magistrate? Is it not to protect those rights delineated in the Fourth Amendment, to uphold the Warrant Clause,¹⁶⁵ to protect the public as “a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer,”¹⁶⁶ precisely because of neutral and detached scrutiny? The courts devalue the role of the magistrate and thus undermine the integrity of the Warrant Clause by allowing subsequent, subjective testimony of an officer to validate an otherwise invalid warrant.

163. 468 U.S. at 923 (quoting *Brown v. Illinois*, 422 U.S. 590, 611 (1975) (Powell, J., concurring in part)).

164. *Id.* at 955-60, 966 (Brennan, Marshall, J.J., dissenting) (Stevens, J., dissenting in part). “The police will now know that if they can secure a warrant, so long as the circumstances of its issuance are not ‘entirely unreasonable,’ all police conduct pursuant to that warrant will be protected from further judicial review.” *Id.* at 957 (Brennan, Marshall, J.J., dissenting) (citation omitted). Justice Stevens noted that when a court refuses to suppress evidence obtained via a warrant unsupported by probable cause, “it considers the police conduct to satisfy a ‘newfangled’ nonconstitutional standard of reasonableness.” *Id.* at 966 (Stevens, J., dissenting) (citation omitted). This “creation of a double standard of reasonableness inevitably must erode the deterrence rationale that still supports the exclusionary rule.” *Id.* at 976 (Stevens, J., dissenting).

165. U.S. CONST. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

166. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979) (quoting *United States v. Chadwick*, 433 U.S. 1, 9 (1977)).

The “totality of the circumstances” standard is being hailed by a majority of circuits as license for going beyond the four corners of the affidavit and warrant in determining objective good faith. Yet, the circuits are split regarding this issue.¹⁶⁷ Likely, the Supreme Court will revisit the “all circumstances” language of *Leon* and the resulting, prevailing extension promulgating consideration of the subjective knowledge of the officer outside of that presented to the magistrate.¹⁶⁸ Justice Blackmun aptly noted the need for the High Court to monitor the effects of the good-faith exception to the exclusionary rule and alter its scope, if necessary, “in light of changing judicial understanding about the effects of the rule.”¹⁶⁹ The current slide toward a subjective standard for applying the good-faith exception, therefore, may force the Supreme Court to settle the issue. As a case of first impression, the Eleventh Circuit has ruled.¹⁷⁰ As an issue creating disparity among the circuits, inevitably the Supreme Court must intercede.

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167. See also WHITEBREAD & SLOBOGIN, *supra* note 122, at 28-29.

168. See also *id.* at 33-34.

169. *Leon*, 468 U.S. at 928 (Blackmun, J., concurring).

170. *Martin*, 297 F.3d at 1309.